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AGENCY.[1]

II.

THE history of agency as applied to contract is next to be dealt with. In this branch of the law there is less of anomaly and a smaller field in which to look for traces of fiction than the last. A man is not bound by his servant's contracts unless they are made on his behalf and by his authority, and that he should be bound then is plain common-sense. It is true that in determining how far authority extends, the question is of ostensible authority and not of secret order. But this merely illustrates the general rule which governs a man's responsibility for his acts throughout the law. If, under the circumstances known to him, the obvious consequence of the principal's own conduct in employing the agent is that the public understand him to have given the agent certain powers, he gives the agent those powers. And he gives them just as truly when he forbids their exercise as when he commands it. It seems always to have been recognized that an agent's ostensible powers were his real powers;[2] and on the other hand it always has been the law that an agent could not bind his principal beyond the powers actually given in the sense above explained.

There is, however, one anomaly introduced by agency even into the sphere of contract, — the rule that an undisclosed principal may sue or be sued on a contract made by an agent on his behalf;

[1] 4 Harv. Law Rev. 345.

[2] Y. B. 27 Ass., pl. 5, fol. 133; Anon., 1 Shower, 95; Nickson *v.* Brohan, 10 Mod. 109, etc.

and this must be examined, although the evidence is painfully meagre. The rule would seem to follow very easily from the identification of agent and principal, as I shall show more fully in a moment. It is therefore well to observe at the outset that the power of contracting through others, natural as it seems, started from the family relations, and that it has been expressed in the familiar language of identification.

Generally speaking, by the Roman law contractual rights could not be acquired through free persons who were strangers to the family. But a slave derived a standing to accept a promise to his master *ex persona domini*.[1] Bracton says that contracts can be accepted for a principal by his agent; but he starts from the domestic relations in language very like that of the Roman jurisconsults. An obligation may be acquired through slaves or free agents in our power, if they take the contract in the name of their master.[2]

It was said under Henry V. that a lease made by the seneschal of a prior should be averred as the lease of the prior,[3] and under James I. it was held that an assumpsit to a servant for his master was properly laid as an assumpsit to the master.[4] West's Symboleography belongs to the beginning of the same reign. It will be remembered that the language which has been quoted from that work applies to contracts as well as to torts. A discussion in the Year Book, 8 Edward IV., fol. 11, is thus abridged in Popham: "My servant makes a contract, or buys goods to my use; I am liable, and it is my act."[5] Baron Parke explains the requirement that a deed executed by an agent should be executed in the name of his principal, in language repeated from Lord Coke: "The attorney is . . . put in place of the principal and represents his person."[6] Finally, Chitty, still speaking of contracts, says, like

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[1] Inst. 3, 17, pr. See Gaius, 3, §§ 164–166.

[2] "Videndum etiam est per quas personas acquiratur obligatio, et sciendum quod per procuratores, et per liberos, quos sub potestate nostra habemus, et per nosmetipsos, et filios nostros et per liberos homines servientes nostros." Bract., fol. 100 *b*. So, "Etiam dormienti per servum acquiritur, ut per procuratorem, si nomine domini stipuletur." Bract., fol. 28 *b*.

[3] Y. B. 8 H. V. 4, pl. 17.

[4] Seignior & Wolmer's Case, Godbolt, 360 (T. 21 Jac.). Cf. Jordan's Case, Y. B. 27 H. VIII. 24, pl. 3.

[5] Drope *v.* Theyar, Popham, 178, 179 (P. 2 Car. I.).

[6] Hunter *v.* Parker, 7 M. & W. 322, 343 (1840); Combes's Case, 9 Rep. 75 *a*, 76 *b*, 77 (T. 11 Jac.). The fiction of identity between principal and agent was fully stated by

West, that "In point of law the master and servant, or principal and agent, are considered as one and the same person." [1]

I have found no early cases turning upon the law of undisclosed principal. It will be remembered that the only action on simple contract before Henry VI., and the chief one for a good while after, was debt, and that this was founded on a *quid pro quo* received by the debtor. Naturally, therefore, the chief question of which we hear in the earlier books is whether the goods came to the use of the alleged debtor.[2] It is at a much later date, though still in the action of debt, that we find the most extraordinary half of the rule under consideration first expressly recognized. In Scrimshire *v.* Alderton [3] (H. 16 G. II.) a suit was brought by an undisclosed principal against a purchaser from a *del credere* factor. Chief Justice Lee "was of opinion that this new method [*i.e.*, of the factor taking the risk of the debt for a larger commission] had not deprived the farmer of his remedy against the buyer." And he was only prevented from carrying out his opinion by the obstinacy of the jury at Guildhall. The language quoted implies that the rule was then well known, and this, coupled with the indications to be found elsewhere, will perhaps warrant the belief that it was known to Lord Holt.

Scott *v.* Surman,[4] decided at the same term that Scrimshire *v.* Alderton was tried, refers to a case of T. 9 Anne, Gurratt *v.* Cullum,[5] in which goods were sold by factors to J. S. without disclosing their principal. The factors afterwards went into bankruptcy. Their assignee collected the debt, and the principal then sued him for the money. "And this matter being referred by Holt for the opinion of the King's Bench, judgment was given on argument for the plaintiff. Afterwards at Guildhall, before Lord Chief Justice Parker, this case was cited and allowed to be law, because though it was agreed that payment by J. S. to [the factors] with whom the contract was

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Hobbes, who said many keen things about the law. Leviathan, Part I. ch. 16. "Of Persons, Authors, and Things Personated." Also De Homine, I. c. 15. De Homine Fictitio.

[1] 1 Bl. Comm. 429, note.

[2] Fitz. Abr. *Dett*, pl. 3 (T. 2 R. II.). Cf. Alford *v.* Eglisfield, Dyer, 230 *b* (T. 6 Eliz.), and notes.

[3] 2 Strange, 1182.

[4] Willes, 400, at p. 405 (H. 16 G. II.).

[5] Also reported in Buller, N. P. 42. Cf. Whitecomb *v.* Jacob, 1 Salk. 160 (T. 9 Anne).

made would be a discharge to J. S. against the principal, yet the debt was not in law due to them, but to the person whose goods they were . . . and being paid to the defendant who had no right to have it, it must be considered in law as paid for the use of him to whom it was due." This explanation seems to show that Chief Justice Parker understood the law in the same way as Chief Justice Lee, and, if it be the true one, would show that Lord Holt did also. I think the inference is somewhat strengthened by other cases from the Salkeld MSS. cited in Buller's *Nisi Prius*.[1] Indeed I very readily should believe that at a much earlier date, if one man's goods had come to another man's hands by purchase, the purchaser might have been charged, although he was unknown and had dealt through a servant,[2] and that perhaps he might have been, in the converse case of the goods belonging to an undisclosed master.[3]

The foregoing cases tend to show, what is quite probable, that the doctrine under discussion began with debt. I do not wish to undervalue the argument that may be drawn from this fact, that the law of undisclosed principal has no profounder origin than the thought that the defendant, having acquired the plaintiff's goods by way of purchase, fairly might be held to pay for them in an action of contract, and that the rule then laid down has been extended since to other contracts.[4]

But suppose what I have suggested be true, it does not dispose of the difficulties. If a man buys B.'s goods of A., thinking A. to be the owner, and B. then sues him for the price, the defendant fairly may object that the only contract which he has either consented or purported to make is a contract with A., and that a stranger, to both the intent and the form of a voluntary obligation cannot sue upon it. If the contract was made with the owner's consent, let the contractee bring his action. If it was made without actual or ostensible authority, the owner's rights can be asserted in an action of tort. The general rule in case of a tortious sale is

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[1] Gonzales *v.* Sladen; Thorp *v.* How (H. 13 W. III.); Buller, N. P. 130.

[2] See Goodbaylie's Case, Dyer, 230 *b*, pl. 56, n.; Truswell *v.* Middleton, 2 Roll. R. 269, 270. Note, however, the insistence on the servant being known as such in Fitz. Abr. *Dett*, pl. 3; 27 Ass., pl. 5, fol. 133.

[3] Consider the doubt as to ratifying a distress made "generally not showing his intent nor the cause wherefore he distrained" in Godbolt, 109, pl. 129 (M. 28 & 29 Eliz.). Suppose the case had been contract instead of tort, and with actual authority, would the same doubt have been felt?

[4] Sims *v.* Bond, 5 B. & Ad. 389, 393 (1833). Cf. Bateman *v.* Phillips, 15 East, 272 (1812).

that the owner cannot waive the tort and sue in assumpsit.[1] Why should the fact that the seller was secretly acting in the owner's behalf enlarge the owner's rights as against a third person? The extraordinary character of the doctrine is still clearer when it is held that under a contract purporting to be made with the plaintiff and another jointly, the plaintiff may show that the two ostensible joint parties were agents for himself alone, and thus set up a several right in the teeth of the words used and of the ostensible transaction, which gave him only a joint one.[2]

Now, if we apply the formula of identification and say that the agent represents the person of the owner, or that the principal adopts the agent's name for the purposes of that contract, we have at once a formal justification of the result. I have shown that the power of contracting through agents started from the family, and that principal and agent were identified in contract as well as in tort. I think, therefore, that the suggested explanation has every probability in its favor. So far as Lord Holt is concerned, I may add that in Gurratt *v.* Cullum the agent was a factor, that a factor in those days always was spoken of as a servant, and that Lord Holt was familiar with the identification of servant and master. If he was the father of the present doctrine, it is fair to infer that the technical difficulty was consciously or unconsciously removed from his mind by the technical fiction. And the older we imagine the doctrine to be, the stronger does a similar inference become. For just in proportion as we approach the archaic stage of the law, the greater do we find the technical obstacles in the way of any one attempting to enforce a contract except the actual party to it, and the greater therefore must have been the need of a fiction to overcome them.[3]

The question which I have been considering arises in another form with regard to the admission of oral evidence in favor of or to charge a principal, when a contract has been made in writing, which purports on its face to be made with or by the alleged agent

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[1] Berkshire Glass Co. *v.* Wolcott, 2 Allen (Mass.), 227.

[2] Spurr *v.* Cass, L. R. 5 Q. B. 656. See further, Sloan *v.* Merrill, 135 Mass. 17, 19.

[3] Cf. The Common Law, ch. x. and xi. "Unsere heutigen Anschauungen . . . können sich nur schwer in ursprüngliche Rechtszustände hineinfinden, in welchen . . . bei Contrahirung oder Zahlung einer Schuld die handelnden Subjecte nicht als personae fungibiles galten." Brunner, Zulässigkeit der Anwaltschaft im französ. etc. Rechte. (Zeitschr. für vergleich. Rechtswissenschaft.) Norcross *v.* James, 140 Mass. 188, 189.

in person. Certainly the argument is strong that such evidence varies the writing, and if the Statute of Frauds applies, that the statute is not satisfied unless the name of the principal appears. Yet the contrary has been decided. The step was taken almost *sub silentio*.[1] But when at last a reason was offered, it turned on, or at least was suggested by, the notion of the identity of the parties. It was in substance that the principal " is taken to have adopted the name of the [agent] as his own, for the purpose of such contracts," as it was stated by Smith in his Leading Cases, paraphrasing the language of Lord Denman in Trueman *v.* Loder.[2]

I gave some evidence, at the beginning of this discussion, that notions drawn from the *familia* were applied to free servants, and that they were extended beyond the domestic relations. All that I have quoted since tends in the same direction. For when such notions are applied to freemen in a merely contractual state of service it is not to be expected that their influence should be confined to limits which became meaningless when servants ceased to be slaves. The passage quoted from Bracton proved that already in his day the analogies of domestic service were applied to relations of more limited subjection. I have now only to complete the proof that agency in the narrower sense, the law familiar to the higher and more important representatives employed in modern business, is simply a branch of the law of master and servant.

First of the attorney. The primitive lawsuit was conducted by the parties in person. Counsel, if they may be called so, were very early admitted to conduct the formal pleadings in the presence of the party, who was thus enabled to avoid the loss of his suit, which would have followed a slip on his own part in uttering the formal words, by disavowing the pleading of his advocate. But the Frankish law very slowly admitted the possibility of giving over the conduct of a suit to another, or of its proceeding in the absence of the principals concerned. Brunner has traced the history of the innovation by which the appointment of an attorney (i. e., *loco positus*) came generally to be permitted, with his usual ability. It was brought to England with the rest of the

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[1] Bateman *v.* Phillips, 15 East, 272 (1812); Garrett *v.* Handley, 4 B. & C. 664 (1825); Higgins *v.* Senior, 8 M. & W. 834, 844 (1841).

[2] 11 Ad. & El. 595; s. c. 3 P. & D. 267, 271 (1840); 2 Sm. L. C., 8th ed., 408, note to Thompson *v.* Davenport; Byington *v.* Simpson, 134 Mass. 169, 170.

Norman law, was known already to Glanvill, and gradually grew to its present proportions. The question which I have to consider, however, is not the story of its introduction, but the substantive conception under which it fell when it was introduced.

If you were thinking of the matter *a priori* it would seem that no reference to history was necessary, at least to explain the client's being bound in the cause by his attorney's acts. The case presents itself like that of an agent authorized to make a contract in such terms as he may think advisable. But as I have hinted, whatever common-sense would now say, even in the latter case it is probable that the power of contracting through others was arrived at in actual fact by extending the analogy of slaves to freemen. And it is at least equally clear that the law had need of some analogy or fiction in order to admit a representation in lawsuits. I have given an illustration from Iceland in my book on the Common Law. There the contract of a suit was transferred from Thorgeir to Mord "as if he were the next of kin."[1] In the Roman law it is well known that the same difficulty was experienced. The English law agreed with the Northern sources in treating attorneys as sustaining the *persona* of their principal. The result may have been worked out in a different way, but that fundamental thought they had in common. I do not inquire into the recondite causes, but simply observe the fact.

Bracton says that the attorney represents the *persona* of his principal in nearly everything.[2] He was "put in the place of" his principal, *loco positus* (according to the literal meaning of the word *attorney*), as every other case in the *Abbreviatio Placitorum* shows. The *essoign de malo lecti* had reference to the illness of the attorney as a matter of necessity.[3] But, in general, the attorney was dealt with on the footing of a servant, and he is called so as soon as his position is formulated. Such is the language of the passage in West's Symboleography which I have quoted above, and the anonymous case which held an attorney not liable for maliciously acting in a cause which he knew to be unfounded.[4] When, therefore, it is said that the "act of the attorney

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[1] The Common Law, 359. See Brunner, in 1 Holtzendorff, Encyc. II. 3, A. 1, § 2, 3d ed., p. 166. 1 Stubbs, Const. Hist. 82.

[2] "Attornatus fere in omnibus personam domini representat." Bract., fol. 342 *a*. See LL. Hen. I. 42, § 2.

[3] Bract., fol. 342 *a*. Cf. Glanv. XI., c. 3.

[4] Anon., 1 Mod. 209, 210 (H. 27 & 28 Car. II.).

is the act of his client," it is simply the familiar fiction concerning servants applied in a new field. On this ground it was held that the client was answerable in trespass, for assault and false imprisonment, where his attorney had caused the party to be arrested on a void writ, wholly irrespective, it would seem, of any actual command or knowledge on the part of the client;[1] and in trespass *quare clausum*, for an officer's breaking and entering a man's house and taking his goods by command of an attorney's agent without the actual knowledge either of the client or the attorney. The court said that the client was "answerable for the act of his attorney, and that [the attorney] and his agent [were] to be considered as one person."[2]

The only other agent of the higher class that I think it necessary to mention is the factor. I have shown elsewhere that he is always called a servant in the old books.[3] West's language includes factors as well as attorneys. Servant, factor, and attorney are mentioned in one breath and on a common footing in the Year Book, 8 Edward IV., folio 11 *b*. So Dyer,[4] "if a purveyor, factor, or servant make a contract for his sovereign or master." So in trover for money against the plaintiff's "servant and factor."[5] It is curious that in one of the first attempts to make a man liable for the fraud of another, the fraudulent party was a factor. The case was argued in terms of master and servant.[6] The first authority for holding a master answerable for his servant's fraud is another case of a factor.[7] Nothing is said of master and servant in the short note in Salkeld. But in view of the argument in Southern *v.* How, just referred to, which must have been before Lord Holt's mind, and the invariable language of the earlier books, including Lord Holt's own when arguing Morse *v.* Slue ("Factor, who is servant at the master's dispose"),[8] it is safe to assume that he considered the case to be one of master and servant, and it always is cited as such.[9]

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[1] Parsons *v.* Loyd, 3 Wils. 341, 345; s. c. 2 W. Bl. 845 (M. 13 G. III. 1772); Barker *v.* Braham, 2 W. Bl. 866, 868, 869; s. c. 3 Wils. 368.

[2] Bates *v.* Pilling, 6 B. & C. 38 (1826).

[3] The Common Law, 228, n. 3, 181. See further generally, 230, and n. 4, 5.

[4] Alford *v.* Eglisfield, Dyer, 230 *b*, pl. 56.

[5] Holiday *v.* Hicks, Cro. Eliz. 638, 661, 746. See further, Malyne's Lex Merc., Pt. I. c. 16; Molloy, Book 3, c. 8, § 1; Williams *v.* Millington, 1 H. Bl. 81, 82.

[6] Southern *v.* How, Cro. Jac. 468; s. c. Popham, 143.

[7] Hern *v.* Nichols, 1 Salk. 289.

[8] Mors *v.* Slew, 3 Keble, 72.

[9] Smith, Master and Servant, 3d ed., 266.

To conclude this part of the discussion, I repeat from my book on the Common Law,[1] that as late as Blackstone agents appear under the general head of servants; that the precedents for the law of agency are cases of master and servant, when the converse is not the case; and that Blackstone's language on this point is express: "There is yet a fourth species of servants, if they may be so called, being rather in a superior, a ministerial, capacity; such as *stewards*, *factors*, and *bailiffs;* whom, however, the law considers as servants *pro tempore*, with regard to such of their acts as affect their master's or employer's property."[2]

Possession is the third branch of the law in which the peculiar doctrines of agency are to be discovered, and to that I now pass.

The Roman law held that the possession of a slave was the possession of his master, on the practical ground of the master's power.[3] At first it confined possession through others pretty closely to things in custody of persons under the *patria protestas* of the possessor (including prisoners *bona fide* held as slaves). Later the right was extended by a constitution of Severus.[4] The common law in like manner allowed lords to appropriate lands and chattels purchased by their villeins, and after they had manifested their will to do so, the occupation of the villeins was taken to be the right of their lords.[5] As at Rome, the analogies of the *familia* were extended to free agents. Bracton allows possession through free agents, but the possession must be held in the name of the principal;[6] and from that day to this it always has been the law that the custody of the servant is the possession of the master.[7]

The disappearance of the servant under the *persona* of his master, of which a trace was discovered in the law of torts, in this instance has remained complete. Servants have no possession of property in their custody as such.[8] The distinction in this regard between servants and all bailees whatsoever[9] is fundamental,

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[1] P. 228 *et seq.*

[2] 1 Bl. Comm. 427.

[3] The Common Law, 228; Gaius, 3, §§ 164–166.

[4] Inst. 2. 9, §§ 4, 5; C. 7. 32. 1.

[5] Littleton, § 177. Cf. Bract., fol. 191 *a;* Y. B. 22 Ass., pl. 37, fol. 93; Litt., § 172; Co. Lit. 117 *a*.

[6] Bract., fol. 28 *b*, 42 *b*, 43, etc.; Fleta, IV., c. 3, § 1, c. 10, § 7, c. 11, § 1.

[7] Wheteley *v.* Stone, 2 Roll. Abr. 556, pl. 14; s. c. Hobart, 180; Drope *v.* Theyar, Popham, 178, 179.

[8] The Common Law, 227.

[9] The Common Law, 174, 211, 221, 243; Hallgarten *v.* Oldham, 135 Mass. 1, 9.

although it often has been lost sight of. Hence a servant can commit larceny[1] and cannot maintain trover.[2] A bailee cannot commit larceny[3] and can maintain trover.[4] In an indictment for larceny against a third person the property cannot be laid in a servant,[5] it may be laid in a bailee.[6] A servant cannot assert a lien;[7] a bailee, of course, may, even to the exclusion of the owner's right to the possessory actions.[8]

Here, then, is another case in which effects have survived their causes. But for survival and the fiction of identity it would be hard to explain why in this case alone the actual custody of one man should be deemed by the law to be the possession of another and not of himself.

A word should be added to avoid a misapprehension of which there are signs in the books, and to which I have adverted elsewhere.[9] A man may be a servant for some other purpose, and yet not a servant in his possession. Thus, an auctioneer or a factor is a servant for purposes of sale, but not for purposes of custody. His possession is not that of his principal, but, on the contrary, is adverse to it, and held in his own name, as is shown by his lien. On the other hand, if the fiction of identity is adhered to, there is nothing to hinder a man from constituting another his agent for the sole purpose of maintaining his possession, with the same effect as if the agent were a domestic servant, and in that case the principal would have possession and the agent would not.

Agency is comparatively unimportant in its bearing on possession, for reasons connected with procedure. With regard to chattels, because a present right of possession is held enough to maintain the possessory actions, and therefore a bailor, upon a bailment terminable at his will, has the same remedies as a master, although he is not one. With regard to real estate, because the

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[1] Y. B. 13 Ed. IV. 9, 10, pl. 5; 21 H. VII. 14, pl. 21.

[2] The Common Law, 227, n. 2. The distinction mentioned above, under torts, between servants in the house and on a journey, led to the servant's being allowed an appeal of robbery, without prejudice to the general principle. Heydon & Smith's Case, 13 Co. Rep. 67, 69; Drope *v.* Theyar, Popham, 178, 179; Combs *v.* Hundred of Bradley, 2 Salk. 613, pl. 2; ib., pl. 1.

[3] 2 Bish. Crim. Law, § 833, 7th ed.

[4] The Common Law, 174, 243.

[5] 2 East, P. C. 652, 653.

[6] Kelyng, 39.

[7] Bristow *v.* Whitmore, 4 De G. & J. 325, 334.

[8] Lord *v.* Price, L. R. 9 Ex. 54; Owen *v.* Knight, 4 Bing. N. C. 54, 57.

[9] The Common Law, 233.

royal remedies, the assizes, were confined to those who had a feudal seisin, and the party who had the seisin could recover as well when his lands were subject to a term of years as when they were in charge of agents or servants.[1]

Ratification is the only doctrine of which the history remains to be examined. With regard to this I desire to express myself with great caution, as I shall not attempt to analyze exhaustively the Roman sources from which it was derived. I doubt, however, whether the Romans would have gone the length of the modern English law, which seems to have grown to its present extent on English soil.

Ulpian said that a previous command to dispossess another would make the act mine, and, although opinion was divided on the subject, he thought that ratification would have the same effect. He agreed with the latitudinarian doctrine of the Sabinians, who compared ratification to a previous command.[2] The Sabinians' "comparison" of ratification to mandate may have been a mere figure of speech to explain the natural conclusion that if one accepts possession of a thing which has been acquired for him by wrongful force, he is answerable for the property in the same way as if he had taken it himself. It therefore is hardly worth while to inquire whether the glossators were right in their comment upon this passage, that the taking must have been in the name of the assumed principal, — a condition which is ambiguously mentioned elsewhere in the Digest.[3]

Bracton copied Ulpian,[4] still, so far as I have observed, not going beyond cases of distress[5] and disseisin.[6] The first reported cases known to me are again assizes of novel disseisin.[7]

But later decisions went much beyond this point, as may be illustrated by one of them.[8] In trespass *de bonis asportatis* the defendant justified as bailiff. After charging the inquest Gascoigne

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[1] Bract., fol. 207 *a*. Cf. ib., 220. Heusler, Gewere, 126.

[2] D. 43, 16, 1, §§ 12, 14. Cf. D. 46, 3, 12, § 4.

[3] D. 43, 26, 13 (Pomponius).

[4] Bract., fol. 171 *b*.

[5] Fol. 158 *b*, 159 *a*.

[6] Fol. 171. But note that by ratification "*suam facit injuriam, et ita tenetur ad utrumque, ad restitutionem, s.* [*et*] *ad pœnam.*" *Ibid. b.*

[7] Y. B. 30 Ed. I. 128 (Horwood) (where, however, the modern doctrine is stated and the Roman maxim is quoted by the judge); 38 Ass., pl. 9, fol. 223; s. c. 38 Ed. III. 18; 12 Ed. IV. 9, pl. 23; Plowden, 8 *ad fin.*, 27, 31.

[8] Y. B. 7 H. IV. 34, 35, pl. 1.

said that "if the defendant took the chattels claiming property in himself for a heriot, although the lord afterward agreed to that taking for services due him, still he [the defendant] cannot be called his bailiff for that time. But had he taken them without command, for services due the lord, and had the lord afterwards agreed to his taking, he shall be adjudged as bailiff, although he was nowhere his bailiff before that taking." A ratification, according to this, may render lawful *ab initio* an act which without the necessary authority is a good cause of action, and for which the authority was wanting at the time that it was done. Such is still the law of England.[1] The same principle is applied in a less startling manner to contract, with the effect of giving rights under them to persons who had none at the moment when the contract purported to be complete.[2] In the case of a tort it follows, of course, from what has been said, that if it is not justified by the ratification, the principal in whose name and for whose benefit it was done is answerable for it.[3]

Now it may be argued very plausibly that the modern decisions have only enlarged the comparison of the Sabinians into a rule of law, and carried it to its logical consequences. The *comparatur* of Ulpian has become the *æquiparatur* of Lord Coke,[4] it might be said; ratification has been made equivalent to command, and that is all. But it will be seen that this is a very great step. It is a long way from holding a man liable as a wrongful disseisor when he has accepted the wrongfully-obtained possession, to allowing

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[1] Godbolt, 109, 110, pl. 129; s. c. 2 Leon. 196, pl. 246 (M. 28 & 29 Eliz.); Hull *v.* Pickersgill, 1 Brod. & B. 282; Muskett *v.* Drummond, 10 B. & C. 153, 157; Buron *v.* Denman, 2 Exch. 167 (1848); Secretary of State in Council of India *v.* Kamachee Boye Sahaba, 13 Moore, P. C. 22 (1859), 86; Cheetham *v.* Mayor of Manchester, L. R. 10 C. P. 249; Wiggins *v.* United States, 3 Ct. of Cl. 412. But see Bro. Abr., *Trespass*, pl. 86; Fitz. Abr., *Baillie*, pl. 4.

[2] Wolff *v.* Horncastle, 1 Bos. & P. 316 (1798). See further, Spittle *v.* Lavender, 2 Brod. & B. 452 (1821).

[3] Bract. 159 *a*, 171 *b*; Bro., *Trespass*, pl. 113; Bishop *v.* Montague, Cro. Eliz. 824; Gibson's Case, Lane, 90; Com. Dig., *Trespass*, c. 1; Sanderson *v.* Baker, 2 Bl. 832; s. c. 3 Wils. 309; Barker *v.* Braham, 2 Bl. 866, 868; s. c. 3 Wils. 368; Badkin *v.* Powell, Cowper, 476, 479; Wilson *v.* Tumman, 6 Man. & Gr. 236, 242; Lewis *v.* Read, 13 M. & W. 834; Buron *v.* Denman, 2 Exch. 167, 188; Bird *v.* Brown, 4 Exch. 786, 799; Eastern Counties Ry. *v.* Broom, 6 Exch. 314, 326, 327; Roe *v.* Birkenhead, Lancashire, & Cheshire Junction Ry., 7 Exch. 36, 44; Ancona *v.* Marks, 7 H. & N. 686, 695; Perley *v.* Georgetown, 7 Gray, 464; Condit *v.* Baldwin, 21 N. Y. 219, 225; Exum *v.* Brister, 35 Miss. 391; G. H. & S. A. Ry. *v.* Donahoe, 56 Tex. 162; Murray *v.* Lovejoy, 2 Cliff. 191, 195. (See 3 Wall. 1, 9.)

[4] Co. Lit. 207 *a*; 4 Inst. 317. It is *comparatur* in 30 Ed. I. 128; Bract. 171 *b*.

him to make justifiable an act which was without justification when it was done, and, if that is material, which was followed by no possession on the part of the alleged principal.[1] For such a purpose why should ratification be equivalent to a previous command? Why should my saying that I adopt or approve of a trespass in any form of words make me responsible for a past act? The act was not mine, and I cannot make it so. Neither can it be undone or in any wise affected by what I may say.[2]

But if the act was done by one who affected to personate me, new considerations come in. If a man assumes the status of my servant *pro hac vice*, it lies between him and me whether he shall have it or not. And if that status is fixed upon him by my subsequent assent, it seems to bear with it the usual consequence as incident that his acts within the scope of his employment are my acts. Such juggling with words of course does not remove the substantive objections to the doctrine under consideration, but it does formally reconcile it with the general framework of legal ideas.

From this point of view it becomes important to notice that, however it may have been in the Roman law, from the time of the glossators and of the canon law it always has been required that the act should have been done in the name or as agent of the person assuming to ratify it. "Ratum quis habere non potest quod ipsius nomine non est gestum."[3] In the language of Baron Parke in Buron *v.* Denman,[4] "a subsequent ratification of an act done *as agent* is equal to a prior authority." And all the cases from that before Gascoigne downwards have asserted the same limitation.[5] I think we may well doubt whether ratification would ever have been held equivalent to command in the only cases in which that fiction is of the least importance had it not been for the further circumstance that the actor had assumed the position of a servant for the time being. The grounds for the doubt become stronger

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[1] Buron *v.* Denman, 2 Exch. 167 (1848).

[2] Ratification had a meaning, of course, when the usual remedy for wrongs was a blood-feud, and the head of the house had a choice whether he would maintain his man or leave him to the vengeance of the other party. See the story of Howard the Halt, 1 Saga Library, p. 50, ch. 14, end. Compare "although he has not received him" in Fitz. Abr., *Corone*, pl. 428, cited 4 Harv. Law Rev. 355.

[3] Sext Dec. 5. 12 de Reg. Jur. (Reg. 9). It made the difference between excommunication and a mere sin in case of an assault upon one of the clergy. Ibid. 5, 11, 23.

[4] 2 Exch. 167.

[5] *Supra*, pp. 11, 12, n. See also Fuller & Trimwell's Case, 2 Leon. 215, 216; New England Dredging Co. *v.* Rockport Granite Co., 149 Mass. 381, 382; Bract., fol. 28 *b*, 100 *b*.

if it be true that the liability even for commanded acts started from the case of owner and slave.

In any event, ratification like the rest of the law of agency reposes on a fiction, and whether the same fiction or another, it will be interesting in the conclusion to study the limits which have been set to its workings by practical experience.

What more I have to say concerning the history of agency will appear in my treatment of the last proposition which I undertook to maintain. I said that finally I should endeavor to show that the whole outline of the law, as it stands to-day, is the resultant of a conflict between logic and good sense — the one striving to carry fictions out to consistent results, the other restraining and at last overcoming that effort when the results become too manifestly unjust. To that task I now address myself.

I assume that common-sense is opposed to making one man pay for another man's wrong, unless he actually has brought the wrong to pass according to the ordinary canons of legal responsibility, — unless, that is to say, he has induced the immediate wrong-doer to do acts of which the wrong, or, at least, wrong, was the natural consequence under the circumstances known to the defendant. I assume that common-sense is opposed to allowing a stranger to my overt acts and to my intentions, a man of whom I have never heard, to set up a contract against me which I had supposed I was making with my personal friend. I assume that common-sense is opposed to the denial of possession to a servant and the assertion of it for a depositary, when the only difference between the two lies in the name by which the custodian is called. And I assume that the opposition of common-sense is intensified when the foregoing doctrines are complicated by the additional absurdities introduced by ratification. I therefore assume that common-sense is opposed to the fundamental theory of agency, although I have no doubt that the possible explanations of its various rules which I suggested at the beginning of this chapter, together with the fact that the most flagrant of them now-a-days often presents itself as a seemingly wholesome check on the indifference and negligence of great corporations, have done much to reconcile men's minds to that theory. What remains to be said I believe will justify my assumption.

I begin with the constitution of the relation of master and servant, and with the distinction that an employer is not liable for the

torts of an independent contractor, or, in other words, that an independent contractor is not a servant. And here I hardly know whether to say that common-sense and tradition are in conflict, or that they are for once harmonious. On the one side it may be urged that when you have admitted that an agency may exist outside the family relations, the question arises where you are to stop, and why, if a man who is working for another in one case is called his servant, he should not be called so in all. And it might be said that the only limit is found, not in theory, but in common-sense, which steps in and declares that if the employment is well recognized as very distinct, and all the circumstances are such as to show that it would be mere folly to pretend that the employer could exercise control in any practical sense, then the fiction is at an end. An evidence of the want of any more profound or logical reason might be sought in the different circumstances that have been laid hold of as tests, the objections that might be found to each, and in the fact that doubtful cases are now left to the jury.[1]

On the other hand, it might be said that the master is made answerable for the consequences of the negligent acts "of those whom the law denominates *his* servants, because," in the language of that judgment which settled the distinction under consideration,[2] "such servants represent the master himself, and their acts

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[1] Among the facts upon which stress has been laid are the following: 1. Choice. Kelly *v.* Mayor of New York, 11 N. Y. 432, 436. See Walcott *v.* Swampscott, 1 Allen, 101, 103. But although it is true that the employer has not generally the choice of the contractor's servants, he has the choice of the contractor, yet he is no more liable for the contractor's negligence than for that of his servant. 2. Control. Sadler *v.* Henlock, 4 El. & Bl. 570, 578 (1855). Yet there was control in the leading case of Quarman *v.* Burnett, 6 M. & W. 499 (1840), where the employee was held not to be the defendant's servant. Cf. Steel *v.* Lester, 3 C. P. D. 121 (1877). 3. A round sum paid. But this was true in Sadler *v.* Henlock, *sup.*, where the employee was held to be a servant. 4. Power to discharge. Burke *v.* Norwich & W. R.R., 34 Conn. 474 (1867). See Lane *v.* Cotton, 12 Mod. 472, 488, 489. But apart from the fact that this can only be important as to persons removed two stages from the alleged master, and not to determine whether a person directly employed by him is a servant or contractor, the power to discharge a contractor's servants may be given to the contractee without making him their master. Reedie *v.* London & Northwestern Ry. Co., 4 Exch. 244, 258. Robinson *v.* Webb, 11 Bush (Ky.), 464. 5. Notoriously distinct calling. Milligan *v.* Wedge, 12 Ad. & E. 737 (1840); Linton *v.* Smith, 8 Gray (Mass.), 47. This is a practical distinction, based on common-sense, not directly on a logical working out of the theory of agency. Moreover, it is only a partial test. It does not apply to all the cases.

In doubtful cases the matter seems now to be left to the jury, that ever-ready sword for the cutting of Gordian knots, as difficult questions of law generally are.

[2] Littledale, J., in Laugher *v.* Pointer, 5 B. & C. 547, 553 (T. 7 G. IV. 1826).

stand upon the same footing as his own." That although the limits of this identification are necessarily more or less vague, yet all the proposed tests go to show that the distinction rests on the remoteness of personal connection between the parties, and that as the connection grows slighter, the likeness to the original case of menials grows less. That a contractor acts in his own name and on his own behalf, and that although the precise point at which the line is drawn may be somewhat arbitrary, the same is true of all legal distinctions, and that they are none the worse for it, and that wherever the line is drawn it is a necessary one, and required by the very definition of agency. I suppose this is the prevailing opinion.

I come next to the limit of liability when the relation of master and servant is admitted to exist. The theory of agency as applied to free servants no doubt requires that if the servant commits a wilful trespass or any other wrong, when employed about his own business, the master should not be liable. No free man is servant all the time. But the cases which exonerate the master could never have been decided as the result of that theory alone. They rather represent the revolt of common-sense from the whole doctrine when its application is pushed far enough to become noticeable.

For example, it has been held that it was beyond the scope of a servant's employment to go to the further side of a boundary ditch, upon a neighbor's land, and to cut bushes there for the purpose of clearing out the ditch, although the right management of the master's farm required that the ditch should be cleaned, and although the servant only did what he thought necessary to that end, and although the master relied wholly upon his servant's judgment in the entire management of the premises.[1]

Mr. Justice Keating said, the powers given to the servant "were no doubt very wide, but I do not see how they could authorize a wrongful act on another person's land or render his employers liable for a wilful act of trespass." It is true that the act could not be authorized in the sense of being made lawful, but the same is true of every wrongful act for which the principal is held. As to the act being wilful, there was no evidence that it was so in any other sense than that in which every trespass might be said to be,

[1] Bolingbroke *v.* Swindon Local Board, L. R. 9 C. P. 575 (1874). Cf. Lewis *v.* Read, 13 M. & W. 834; Haseler *v.* Lemoyne, 5 C. B. N. S. 530.

and as the judge below directed a verdict for the defendant, there were no presumptions adverse to the plaintiff in the case. Moreover, it has been said elsewhere that even a wilful act in furtherance of the master's business might charge him.[1]

Mr. Justice Grove attempted to draw the line in another way. He said, "There are some things which may be so naturally expected to occur from the wrongful or negligent conduct of persons engaged in carrying out an authority given, that they may be fairly said to be within the scope of the employment." But the theory of agency would require the same liability for both those things which might and those which might not be so naturally expected, and this is only revolt from the theory. Moreover, it may be doubted whether a case could be found where the servant's conduct was more naturally to be expected for the purpose of accomplishing what he had to do.[2]

The truth is, as pretty clearly appears from the opinions of the judges, that they felt the difficulty of giving a rational explanation of the doctrine sought to be applied, and were not inclined to extend it. The line between right and wrong corresponded with the neighbor's boundary line, and therefore was more easily distinguishable than where it depends on the difference between care and negligence, and it was just so much easier to hold that the scope of the servant's employment was limited to lawful acts.

I now pass to fraud. It first must be understood that, whatever the law may be, it is the same in the case of agents, *stricto sensu*, as of other servants. As has been mentioned, the fraudulent servant was a factor in the first reported decision that the master was liable.[3] Now if the defrauded party not merely has a right to repudiate a contract fraudulently obtained, or in general to charge a defendant to the extent that he has derived a benefit from another's fraud, but may hold him answerable *in solidum* for the damage caused by the fraudulent acts of his servant in the course of the latter's employment, the ground can only be the fiction that the act of the servant is the act of the master.

It is true that in the House of Lords[4] Lord Selborne said that

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[1] Howe *v.* Newmarch, 12 Allen, 49 (1866). See also cases as to fraud, *inf.*, and cf. Craker *v.* Chicago & N. W. Ry. Co., 36 Wisc. 657, 669 (1875).

[2] Cf. Harlow *v.* Humiston, 6 Cowen, 189 (1826).

[3] Hern *v.* Nichols, 1 Salk. 289.

[4] Houldsworth *v.* City of Glasgow Bank, 5 App. Cas. 317, 326, 327 (1880).

the English cases "proceeded, not on the ground of any imputation of vicarious fraud to the principal, but because (as it was well put by Mr. Justice Willes in Barwick's case[1]) "with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, no sensible distinction can be drawn between the case of fraud and the case of any other wrong." But this only puts off the evil day. Why is the principal answerable in the case of any other wrong? It is, as has been seen, because, in the language of Mr. Justice Littledale, the "servants represent the master himself, and their acts stand upon the same footing as his own."[2] Indeed Mr. Justice Willes, in the very judgment cited by Lord Selborne, refers to Mr. Justice Littledale's judgment for the general principle. So Lord Denman, in Fuller *v.* Wilson,[3] "We think the principal and his agent are for this purpose completely identified." I repeat more distinctly the admission that no fiction is necessary to account for the rule that one who is induced to contract by an agent's fraud may rescind as against the innocent principal. For whether the fraud be imputed to the principal or not, he has only a right to such a contract as has been made, and that contract is a voidable one. But when you go beyond that limit and even outside the domain of contract altogether to make a man answer for any damages caused by his agent's fraud, the law becomes almost inconceivable without the aid of the fiction. But a fiction is not a satisfactory reason for changing men's rights or liabilities, and common-sense has more or less revolted at this point again and has denied the liability. The English cases are collected in Houldsworth *v.* City of Glasgow Bank.[4]

When it was attempted to carry identification one step further still, and to unite the knowledge of the principal with the statement of the agent in order to make the latter's act fraudulent, as in Cornfoot *v.* Fowke,[5] the absurdity became more manifest and dissent more outspoken. As was most accurately said by Baron

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[1] L. R. 2 Ex. 259.

[2] Laugher *v.* Pointer, 5 B. & C. 547, 553. See Williams *v.* Jones, 3 H. & C. 602, 609.

[3] 3 Q. B. 58, 67; s. c. reversed on another ground, but admitting this principle, ib. 77 and 1009, 1010 (1842).

[4] 5 App. Cas. 317. See The Common Law, p. 231.

[5] 6 M. & W. 358 (1840). It is not necessary to consider whether the case was rightly decided or not, as I am only concerned with this particular ground.

Wilde in a later case,[1] "The artificial identification of the agent and principal, by bringing the words of the one side by side with the knowledge of the other, induced the apparent logical consequence of fraud. On the other hand, the real innocence of both agent and principal repelled the notion of a constructive fraud in either. A discordance of views, varying with the point from which the subject was looked at, was to be expected." The language of Lord Denman, just quoted, from Fuller *v.* Wilson, was used with reference to this subject.

The restrictions which common-sense has imposed on the doctrine of undisclosed principal are well known. An undisclosed principal may sue on his agent's contract, but his recovery is subject to the state of accounts between the agent and third person.[2] He may be sued, but it is held that the recovery will be subject to the state of accounts between principal and agent, if the principal has paid fairly before the agency was discovered; but it is, perhaps, doubtful whether this rule or the qualification of it is as wise as the former one.[3]

Then as to ratification. It has nothing to do with estoppel,[4] but the desire to reduce the law to general principles has led some courts to cut it down to that point.[5] Again, the right to ratify has been limited by considerations of justice to the other party. It has been said that the ratification must take place at a time and under circumstances when the would-be principal could have done the act;[6] and it has been so held in some cases when it was manifestly just that the other party should know whether the act was to be considered the principal's or not, as in the case of an unauthorized notice to quit, which the landlord attempts to ratify after the time of the notice has begun to run.[7] But it is held that bringing an action may be subsequently ratified.[8]

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[1] Udell *v.* Atherton, 7 H. & N. 172, 184 (1861).

[2] Rabone *v.* Williams, 7 T. R. 360 (1785); George *v.* Clagett, 7 T. R. 359 (1797); Carr *v.* Hinchliff, 4 B. & C. 547 (1825); Borries *v.* Imperial Ottoman Bank, L. R. 9 C. P. 38 (1873); Semenza *v.* Brinsley, 18 C. B. N. S. 467, 477 (1865); *Ex parte* Dixon, 4 Ch. D. 133.

[3] Armstrong *v.* Stokes, L. R. 7 Q. B. 598, 610; Irvine *v.* Watson, 5 Q. B. D. 414.

[4] See Metcalf *v.* Williams, 144 Mass. 452, 454, and cases cited.

[5] Doughaday *v.* Crowell, 3 Stockt. (N. J.) 201; Bird *v.* Brown, 4 Exch. 788, 799.

[6] Bird *v.* Brown, 4 Exch. 788.

[7] Doe *v.* Goldwin, 2 Q. B. 143.

[8] Ancona *v.* Marks, 7 H. & N. 686.

I now take up pleading. It is settled that an assumpsit[1] to or by a servant for his master may be laid as an assumpsit to or by the master. But these are cases where the master has commanded the act, and, therefore, as I showed in the beginning of this discussion, may be laid on one side. The same thing is true of a trespass commanded by the master.[2] But when we come to conduct which the master has not commanded, but for which he is responsible, the difficulty becomes greater. It is, nevertheless, settled that in actions on the case the negligence of the servant is properly laid as the negligence of the master,[3] and if the analogy of the substantive law is to be followed, and the fiction of identity is to be carried out to its logical results, the same would be true of all pleading. It is so held with regard to fraud. "The same rule of law which imputes to the principal the fraud of the agent and makes him answerable for the consequences justifies the allegation that the principal himself committed the wrong."[4] Some American cases have applied the same view to trespass,[5] and have held that this action could be maintained against a master whose servant had committed a trespass for which he was liable although he had not commanded it. But these decisions, although perfectly reasonable, seem to have been due rather to inadvertence than to logic, in the first instance, and the current of authority is the other way. Baron Parke says, "The maxim '*Qui facit per alium, facit per se*' renders the master liable for all the negligent acts of the servant in the course of his employment, but that liability does not make the *direct* act of the servant the *direct* act of the master. Trespass will not lie against him; case will, in effect, for employing a careless servant."[6] Considered as reasoning, it would be hard to unite more errors in as many words. "*Qui facit per alium, facit per se*" as an axiom admitted by common-sense goes no farther than to make a man liable for commanded trespasses, and for them trespass lies. If it be extended beyond that point it simply embodies the fiction, and the

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[1] Seignior and Wolmer's Case, Godbolt, 360.

[2] Gregory *v.* Piper, 9 B. & C. 591.

[3] Brucker *v.* Fromont, 6 T. R. 659 (1796).

[4] Comstock, Ch. J., in Bennett *v.* Judson, 21 N. Y. 238 (1860); acc. Barwick *v.* English Joint Stock Bank, L. R. 2 Ex. 259 (1867).

[5] Andrew *v.* Howard, 36 Vt. 248 (1863); May *v.* Bliss, 22 Vt. 477 (1850).

[6] Sharrod *v.* London & N. W. Ry. Co., 4 Exch. 580, 585 (1849). Cf. Morley *v.* Gaisford, 2 H. Bl. 442 (1795).

precise point of the fiction is that the direct act of one is treated as if it were the direct act of another. To avoid this conclusion a false reason is given for the liability in general.[1] It is, as has been shown, the old fallacy of the Roman jurists, and is disposed of by the decisions that no amount of care in the choice of one's servant will help the master in a suit against him.[2] But although the reasoning is bad, the language expresses the natural unwillingness of sensible men to sanction an allegation that the defendant directly brought force to bear on the plaintiff, as the proper and formal allegation, when as a matter of fact it was another person who did it by his independent act, and the defendant is only answerable because of a previous contract between himself and the actual wrong-doer.[3] Another circumstance may have helped. Usually the master is not liable for his servant's wilful trespasses, and, therefore, the actions against him stand on the servant's negligence as the alternative ground on which anybody is responsible. There was for a time a confused idea that when the cause of action was the defendant's negligence, the proper form of action was always case.[4] Of course if this was true it applied equally to the imputed negligence of a servant. And thus there was the farther possibility of confounding the question of the proper form of action with the perfectly distinct one whether the defendant was liable at all.

I come finally to the question of damages. In those States where exemplary damages are allowed, the attempt naturally has been made to recover such damages from masters when their servants' conduct has been such as to bring the doctrine into play. Some courts have had the courage to be consistent.[5] "What is the principle," it is asked, "upon which this rule of damages is founded? It is that the act of the agent is the act of the principal himself. . . . The law has established, to this extent, their legal unity and identity. . . . This legal unity of the principal

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[1] The same reason is given in M'Manus *v.* Crickett, 1 East, 106, 108 (1800). Compare 1 Harg. Law Tracts, 347; Walcott *v.* Swampscott, 1 Allen, 101, 103; Lane *v.* Cotton, 12 Mod. 472, 488, 489.

[2] Dansey *v.* Richardson, 3 El. & Bl. 144, 161. See p. 15.

[3] M'Manus *v.* Crickett, 1 East, 106, 110 (1800); Brucker *v.* Fromont, 6 T. R. 659 (1796).

[4] Ogle *v.* Barnes, 8 T. R. 188 (1799). Cf. Leame *v.* Bray, 3 East, 593 (1803).

[5] New Orleans, Jackson, & Great Northern R. R. Co. *v.* Bailey, 40 Miss. 395, 452, 453, 456 (1866); acc. Atlantic & G. W. Ry. Co. *v.* Dunn, 19 Ohio St. 162.

and agent, in respect to the wrongful or tortious, as well as the rightful acts, of the agent, done in the course of his employment, is an incident which the law has wisely attached to the relation, from its earliest history." "If then the act of the agent be the act of the principal in law, and this legal identity is the foundation of the responsibility of the principal, there can be no escape from his indemnity to the full extent of civil responsibility." An instruction that the jury might give punitive damages was upheld, and the plaintiff had judgment for $12,000. Whatever may be said of the practical consequences or the English of the opinion from which these extracts are made, it has the merit of going to the root of the matter with great keenness. On the other hand, other courts, more impressed by the monstrosity of the result than by the *elegantia juris*, have peremptorily declared that it was absurd to punish a man who had not been to blame, and have laid down the opposite rule without hesitation.[1]

I think I now have made good the propositions which I undertook at the beginning of this essay to establish. I fully admit that the evidence here collected has been gathered from nooks and corners, and that although in the mass it appears to me imposing, it does not lie conspicuous upon the face of the law. And this is equivalent to admitting, as I do, that the views here maintained are not favorites with the courts. How can they be? A judge would blush to say nakedly to a defendant: "I can state no rational ground on which you should be held liable, but there is a fiction of law which I must respect and by which I am bound to say that you did the act complained of, although we both know perfectly well that it was done by somebody else whom the plaintiff could have sued if he had chosen, who was selected with the utmost care by you, who was in fact an eminently proper person for the employment in which he was engaged, and whom it was not only your right to employ, but much to the public advantage that you should employ." That would not be a satisfactory form in which to render a decision against a master, and it is not pleasant even to admit to one's self that such are the true grounds upon which one is deciding. Naturally, therefore, judges have striven to find more intelligible reasons, and have done so in the utmost good faith; for

[1] Hagar *v.* Providence & Worcester R. R., 3 R. I. 88 (1854); Cleghorn *v.* New York Central & Hudson River R. R., 56 N. Y. 44 (1874). Cf. Craker *v.* Chicago & N. W. R. R., 36 Wis. 657 (1875).

whenever a rule of law is in fact a survival of ancient traditions, its ancient meaning is gradually forgotten, and it has to be reconciled to present notions of policy and justice, or to disappear.

If the law of agency can be resolved into mere applications of general and accepted principles, then my argument fails; but I think it cannot be, and I may suggest, as another ground for my opinion beside those which I have stated heretofore, that the variety of reasons which have been offered for the most important application of the fiction of identity, the liability of the master for his servant's torts, goes far to show that none of those reasons are good. Baron Parke, as we have seen, says that case is brought in effect for employing a negligent servant. Others have suggested that it was because it was desirable that there should be some responsible man who could pay the damages.[1] Mr. Justice Grove thinks that the master takes the risk of such offences as it must needs be should come.

I admit my scepticism as to the value of any such general considerations, while on the other hand I should be perfectly ready to believe, upon evidence, that the law could be justified as it stands when applied to special cases upon special grounds.[2]

There should have been added to the illustrations of a man's responsibility within his house, given in the former article at p. 360, that of a vassal for attempts on the chastity of his lord's daughter or sister "tant com elle est Damoiselle en son Hostel," in Ass. Jerusalem, ch. 205, 217, ed. 1690. The origin of the liability of innkeepers never has been studied, so far as I know. Beaumanoir, c. 36, seems to confine the liability to things intrusted to the innkeeper, and to limit it somewhat even in that case, and to suggest grounds of policy. The English law was more severe, and put it on the ground that the guest for the time had come to be under the innkeeper's protection and safety. 42 Ass., pl. 17, fol. 260. A *capias* was refused on the ground that the defendant was not in fault, but an *elegit* was granted. 42 Ed. III. 11, pl. 13. Notwithstanding the foregoing reason given for it, the liability was confined, at an early date, to those exercising a common calling (*common hostler*). 11 Hen. IV. 45, pl. 18. See The Common Law, 183–189, 203. See further, 22 Hen. VI. 21, pl. 38; ib. 38, pl. 8. And note a limitation of liability in cases of taking by the king's enemies, similar to that of bailees. Plowden, 9, and note in margin; The Common Law, 177, 182, 199, 201. The references to the custom of England, or to the *lex terræ*, are of no significance. The Common Law, 188. See further, the titles of Glanville and Bracton. Other citations could be given if necessary.

Oliver Wendell Holmes, Jr.

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[1] See Williams *v.* Jones, 3 H. & C. 256, 263; 1 Harg. Law Tracts, 347.

[2] Cf. what is said as to common carriers in The Common Law, 204, 205.